Petition

81-1501

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NO. _____

IN THE SUPREME COURT
OF
THE UNITED STATES
OCTOBER TERM, 1981

RICK R. LACEY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner's probation revocation was based upon sufficient evidence that would comply with fundamental fairness as required by the due process clause of the Fifth Amendment of the Constitution of the United States.

II. Whether the " exclusionary rule " should be applied in a federal probation revocation hearing.

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NO. _____

IN THE SUPREME COURT
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October Term, 1981

RICK R. LACEY, Petitioner,
VS.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on November 9, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case are cited as United States v. Lacey, No. 80-2052, 648 F.2d 441 (5th Cir. 1981, and United States v. Lacey, No. 80-2052, ___ F.2d _____ (5th Cir. 1981), petition for rehearing denied, January 4, 1982.

JURISDICTION

The final judgment of the Court of Appeals was entered on November 9, 1981. Petitioner's petition for panel rehearing was denied on January 4, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT

" The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. "

FIFTH AMENDMENT

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. "

STATEMENT OF THE CASE

Petitioner, Rick R. Lacey, was placed on probation by the United States District Court for the Southern District of Texas on August 12, 1977, after entering a guilty plea to an indictment charging an unlawful possession with intent to distribute a quantity of Marihuana in violation of 21 U.S.C. 841(a)(1).

Petitioner was placed on supervised probation for a period of five years, after the District Court suspended the execution of a five year prison sentence. The District Court retained jurisdiction over the matter, but it assigned probation supervision to the United States Probation Office located in Wichita, Kansas. (Vol. 1, p.73)

During April and August of 1980, based primarily on an alleged drug offense arising from an arrest in September, 1979, revocation proceedings were instituted against petitioner. (Vol. 1, p.76,82,83).

Thereafter, on September 23, 1980, a hearing was had upon an amended petition for revocation before the United States District Court for the Southern District of Texas, the Honorable Owen D. Cox presiding. (Vol. 2, p.1-62).

Petitioner's probation revocation hearing of September 23, 1980, reflects the narrative testimony, as follows:

Petitioner Lacey plead not true to a Form 12 petition for revocation alleging the violation of probation conditions, to wit:

(A) Possesion of Methamphetamine and Marihunana;

(B) Unlawful Use of License,

(C) Leaving the District without permission. (Vol. 2., p. 3, 7.).

Whereafter, the government presented its case against the petitioner.

Vincente Aguilar, Jr., testified that he was familiar with Rick R. Lacey, who was placed on probation by the District court, and that he filed the amended Form 12 petition on allegations surrounding Lacey's arrest in Wichita, Sedgwick County, Kansas, on September 19, 1979. (Vol. 2, p.3, 7).

Defense counsel timley objects to any evidence resulting from any illegal search, and that hearsay not be admitted. The District court overruled said objections, but allowed a continuing objection based on hearsay. (Vol. 2, p. 5, 6.)

Mr Aguilar, a supervising probation officer for the Southern District of Texas, then testified that though he had no first-hand knowledge of the facts, Mr. Aguilar had spoken to an assistant district attorney in Kansas by telephone on one occasion, who

advised him that there was no illegal search and that the case was dismissed because of a problem with a witness. (Vol. 2, p. 8 through p. 17).

The government then called Detective Bob Downs, a detective of the Sedgwick County Sheriff's Office in Wichita, Kansas, who gave the following testimony concerning Mr. Lacey's arrest on September 19, 1979, in a parking area at a business location in Wichita, Kansas.

Detective Downs testified that on September 19, 1979, while he drove across a street and into a driveway of a Volvo dealership in Wichita, Kansas, he observed Mr. Lacey pass something across the interior of a Volvo to another person, but that he did not know what it was. He then observed the other person stand up, walk to a white Corvette, parked nearby, and place it inside the white Corvette. About five minutes latter, Detective Downs walked over to the white Corvette and observed a red baseball cap with a plastic bag of white substance, and a pack of Camel cigarettes, in the cap, which was located inside the interior of the white Corvette. Upon observing the bag of white substance, he called for the assistance of a lab and vice officers. (Vol. 2. p. 17, 18, 19, 26, 27).

Detective Downs further testified that Lacey was arrested, handcuffed and asked for his identification. Mr. Lacey answered that his identification was in his pocket, and an Officer Finnegar removed an identification from one of Lacey's pocket, handed it to Detective Downs, who then ran a record check to determine if the subject was wanted. The identification taken from Lacey was a driver's license in the name of a Victor W. Wohrley. (Vol. 2, p. 20, 21, 22). Detective Downs also testified that the Kansas case was dismissed and that he was told that the judge suppressed evidence. (Vol. 2, p. 23, 24, 25, 26)

Next the government called R. J. Letourneau, a detective in the forensic labatory of the Sedgwick County Sheriff's Office in Wichita, Kansas, who testified that he had been called to a Volvo dealership in Wichita, Kansas, on September 19, 1979, concerning a Corvette under suspicion of being a reported stolen car. He found the Corvette in the parking lot, without any license tag on it. He photographed and dusted the Corvette for latent fingerprints, but was never requested to compare the lifts with Mr. Lacey's or anyone else. (Vol. 2, p. 30 through p. 40) He removed a red and white baseball cap, from the inside of the

Corvette, which contained a pack of Camel cigarettes and a plastic bag containing a white powder. He placed the items in an evidence container, after they were removed from the white Corvette. (Vol. 2, p. 34, 35)

The government then called its last witness, Melinda K. Doubette, a forensic chemist for the Wichita Police Department. Ms. Doubette testified that the white powder contained in the plastic bag removed from the Corvette was tested and found the substance to be Methamphetamine. (Vol. 2, p. 44, 45).

Thereafter, the government rests its case, and the defense rests it case.

After argument of counsel, the District court revoked the probation of Lacey, and the following morning assessed a five year prison term against petitioner. (Vol. 2, p. 50, 51, 61, 61). Petitioner filed his Notice of Appeal and was released on appearance bond pending his appeal to the United States Court of Appeals for the Fifth Circuit. (Vol. 1, p. 82, 83, 89, 90, 91-101).

On June 19, 1981, the United States Court of Appeals for the Fifth Circuit issued a mandate remanding these proceedings to the District court requiring the revoking judge to state factual findings and reasons relied

upon for revocation, and further reserved Lacey's right to appeal from the ultimate action of the District Court. United States v. Lacey, 648 F.2d 441 (5th Cir. 1981) (Appendix A).

On October 7, 1981, the District Court, without further hearing or show of proof, filed its " MEMORANDUM AND ORDER ", which contained findings of facts and conclusions of law supporting the probation revocation of petitioner. (Appendix B).

On November 9, 1981, the United States Court of Appeals for the Fifth Circuit entered judgment affirming the District Court's revocation of petitioner's probation. United States v. Lacey, (No. 81-2052; opinion filed November 9, 1981) (Appendix C).

Thereafter, on January 4, 1982, petitioner's petition for panel rehearing was denied by the United States Court of Appeals for the Fifth Circuit. (Appendix D).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER FUNDAMENTAL FAIRNESS AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AS ESTABLISHED BY THIS SUPREME COURT IN Gagnon v. Scarpelli, 411 U.S. 778 (1973), WAS AFFORDED PETITIONER AT HIS PROBATION REVOCATION HEARING HEREIN, NOTWITHSTANDING, THIS COURT'S 1932 DECISION IN Burns v. United States, 287 U.S. 216, REGARDING EVIDENCE NECESSARY TO SUPPORT A PROBATION REVOCATION.

After the District court revoked the petitioner's probation, the petitioner took his appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit thereafter remanded this matter to the District court for further findings consistent with principles of due process standards. United States v. Lacey, 648 F.2d 441 (5th Cir. 1981), (Appendix A)

On remand, the District court, without further formal hearing, filed its "MEMORANDUM AND ORDER", which contained findings of facts and conclusions of law regarding the revocation of petitioner's probation. (Appendix B)

The findings and conclusions of the District court specified that petitioner's probation was revoked based upon a finding that the petitioner violated a condition of probation by " possession of a quantity of methamphetamine and passed the substance to another. ". (Appendix B)(4). The District court further found that there was insufficient evidence to find the petitioner was in possession of a quantity of marihuana in violation of his probation conditions. (Appendix B)(5). Also, the District court found that the petitioner did not violate his probation conditions by leaving the district of his probation without authorization. (Appendix B)(5). However, the District court did also find that:

> " 4. From testimony of Detective Downs, the Court concludes that the Defendant had on his person at the time of his arrest, and was using as if it were in fact his, a driver's license in the name of Victor W. Wohrley. This action by the Defendant was in violation of a Kansas misdemeanor statute. To this extent the Court finds that the Defendant violated the charge in number three. ". (Appendix B)(5).

The petitioner contends that he has been deprived of due process of law since the District court did not have sufficient proof presented to sustain a finding and conclusion

that he possessed and passed a quantity of methamphetamine to another. The transcript of petitioner's probation revocation hearing (Vol. 2, p. 1 through 63) relates only the following facts concerning the allegation that petitioner possessed and passed to another a quantity of methamphetamine:

Detective Downs testified:

> Q. All right, and what, if anything, unusual did you see the defendant do?
>
> A. The only thing unusual -- well, I don't know whether you would call it unusual or not. The defendant was leaning over the front seat of a Volvo and the other man was standing on the right side, he was on the left, and something was crossed, and then the young man bent in the back seat of the Volvo.
>
> Q. Something was done what, passed?
>
> A. Mr. Lacey was in the left front of the Volvo.
>
> Q. All right.
>
> A. There was another man on the right side of the Volvo with the doors open. Something was passed across.
>
> Q. From Mr. Lacey to this other individual?
>
> A. Yes, sir.
>
> Q. What did the other individual do with whatever it was?
>
> A. The other individual stood up, walked back to a white Corvette and placed it in the right side of the Corvette.
>
> Q. Did you walk over to the Corvette and see what it was?

A. At a latter time.

Q. How much latter, approximately?

A. Oh, probably about five minutes latter.

Q. And what was this thing you saw?

A. There was a red baseball cap there with a plastic bag with a white substance in it.

Q. Was the thing you saw passed between Mr. Lacey and this other individual, the baseball hat?

A. That I could not answer. All I saw was the gentleman stand up with the hat and walk to the car, the Corvette.

Q. And put the hat in the Corvette?

A. Yes, sir.(Vol. 2, p. 18, 19)

.....

Q. Didn't you also a minute ago on direct examination say that you saw Lacey pass something to this man?

A. There was something passed across. I did not know what it was. (Vol. 2, p. 28)

.....

A. Let me reiterate, sir, you are asking me when I got there. Where I got was in the parking lot of Gorge's Volvo. I was sitting across the street, coming across into the drive as it happened. The other two officers was on the other side, coming in also. Officer Gallegos was coming from the back of Gorge's Volvo.

Q. Okay, and to be fair, you are saying you don't even know what it was that passed, whether it was the red cap or what?

A. I said I seen something passed across the car. I do not know what it was. (Vol. 2, p. 29, 30)

In sum, petitioner claims that the District court abused its discretion in its overruling of all objections made by the petitioner's counsel at the final revocation hearing. (Vol. 2, p. 4, 5, 6, 7, 9, 21, 23, 34, 35, 44, 46) Further, the District court denied petitioner due process of law when it based its findings that Lacey possessed and passed illicit drugs to another upon pure conjecture and speculation. Also the petitioner claims that the District court abused its discretion in not excluding the admission of the false driver's license secured as the fruit of an unlawful seizure by police. Or, in the alternative, find that the possession of the driver's license was a minor violation of probation not requiring the ultimate sanction of a prison term.

Nonetheless, on November 9, 1981, the Fifth Circuit affirmed the District court's judgment revoking petitioner's probation citing Burns v. United States, 287 U.S. 216, 221, 53 S.Ct. 154, 156, 77 L.Ed. 266.

This Court in Burns v. United States, supra, confronted the question of what amount of evidence is necessary to support a probation revocation.

In the Burns holding this court stated that evidence to support a revocation need not

establish guilt beyond a reasonable doubt; all that is required is that the evidence of the facts reasonably satisfy the judge that the conduct of the probationer violates the conditions of probation. This Court then went further to state that a District court has broad discretion with regard to the revocation of probation, and its actions will not be disturbed in the absence of a clear showing of an abuse of that discretion.

Though petitioner concedes that the Burns Case, supra, has been the leading legal authority since 1932, petitioner reasons that additional guidance is required since the landmark cases of Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973) now demand that probationers be afforded fundamental due process hearing and adjudication, before probation can be revoked.

In the instant case, the petitioner was never found guilty of any criminal offense, and all charges filed against him were dismissed by a Kansas district court. In Kansas, as well as in the United States District Court, the petitioner has entered pleas of not guilty to the charges involving any drug possession, and moved to suppress the driver's license removed from his pants pocket. (Vol. 2, p. 23, 24, 25, 26, 36, 37, 39, 40, 41, and p. 11)

The petitioner had complied with all reporting conditions, was gainfully employed, and was not alleged to have violated any other probation conditions. However, the District court didn't consider whether the dismissals of the Kansas district court should be followed, either on the merits or the legal principles raised therin. (Vol. 2, p. 3, 4, 5, 6, 7, 9, 21, 34, 35, 44, 46, 50)

Petitioner asserts that both Morrissey and Gagnon, supra, establish the minimum requirments of due process in a probation revocation hearing. In the instant case, the Fifth Circuit did remand this matter to the District court for failure to make factual findings in faithful complaisance with this Court's holdings in Morrissey and Gagnon, supra. (Appendix A). However, the Fifth Circuit latter affirmed the District court's revocation of petitioner's probation, as is contained in Appendix C, after reviewing the District court's finding of facts and conclusions of law, as is contained in Appendix B.

The petitioner contends fudamental fairness is tantamount to the minimums required pursuant to the scheme of a constitutional due process hearing. The touchstone of any hearing

is fundamental fairness, whether in a criminal trial, or a probation revocation hearing, when a loss of liberty is at stake. This Court's decision in Burns v. United States, supra, set a standard regarding evidence needed to support a probation revocation. Petitioner would argue that Burns does not apply a standard consistent with due process, because minimum due process reqirements for a probation revocation hearing were not established until forty years after the Burns case, in this Court's holdings in Morrissey and Gagnon, supra.

Therefore, in conclusion, this Court by granting certiorari will be confronted with an opportunity to give guidance concerning the applicable standard of proof needed to support a probation revocation, pursuant to the due process clause of the Fifth Amendment of the Constitution of the United States, which has not been directly addressed by this Court since 1932. Further, petitioner would argue that the evidence was insufficient to support the District court's findings, and that, at any rate the District court abused its discretion in revoking probation.

II. A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF THE " EXCLUSIONARY RULE " IN FEDERAL PROBATION REVOCATION HEARINGS.

The application of the Fourth Amendment exclusionary rule to a probation revocation hearing has not been confronted by the United States Supreme Court, and therefore, its lack of guidance has resulted in serious conflicts among various United States Courts of Appeals.

The Fifth Circuit has held that the excusionary rule inapplicable, absent a showing of police miscnduct or harassment. United States v. Wiygul, 578 F.2d 577 (5th Cir.1978), United States v. Brown, 488 F.2d 94 (5th Cir. 1973). Further, the Fifth Circuit has recently held that the Miranda protection is inapplicable to probation revocation proceedings. United States v. MacKenzie, 601 F.2d 221 (5th Cir. 1979), cert. denied, 444 U.S. 1018 (1980).

The Eighth Circuit has held in United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978), that the Fourth Amendment exclusionary rule does not apply to probation revocation hearings.

The Ninth Circuit has held that the exclusionary rule, pursuant to the Fourth Amendment, is inapplicable to probation revocation proceedings, if at the time of the

unlawful search police did not know or have reason to believe the subject was on probation. United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975).

The Sixth Circuit has held that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings, if no police harassment is shown, because the exclusionary rule would not serve in the deterrence purpose for which it was originally created. United States v. Farmer, 512 F.2d 160 (6th Cir. 1975).

However, the Fourth Circuit has held that the Fourth Amendment exclusionary rule precludes the admission of unconstitutionally seized evidence in a probation revocation hearing, since it would provide a deterrence to unlawful police practices. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

In the instant case, petitioner's counsel made timely objections, both at the beginning and when the evidence was offered into evidence, at the final revocation hearing. (Vol. 2, p. 5, 6, 46) Petitioner's counsel advised the District court that the evidence in the case had been suppressed by a Kansas district court, and that he objected to any unconstitutionally seized evidence.

The District court did not suppress any evidence at the revocation hearing, and the Fifth Circuit affirmed the District court's holding that in the absence of police harassment, the exclusionary rule does not apply in revocation proceedings. United States v. lacey, 648 F.2d 441, footnote 3., (5th Cir. 1981). (Appendix A).

Petitioner submits that the Fourth Amendment " exclusionary rule " must be applied at probation revocation hearings because a probation revocation is an adjudicative criminal proceeding which can result in a loss of liberty, and that the application of the " exclusionary rule " to a probation revocation hearing would result in approximately the same potential for injury and benefit as its application in other criminal adjudicative proceedings. United States v. Workman, supra..

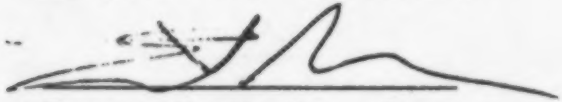
In the instant matter, petitioner maintains that the search and seizure of his person, as well as, the removal of a false driver's license from his pocket, was not based upon probable cause at the time of his arrest on September 19, 1979. Therefore, its admission at the probation revocation hearing violated petitioner's right to be

secure in his person and effects from any unreasonable search and seizure pursuant to the Fourth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

For the above reasons, Petitioner prays his probation revocation be reversed, or that this matter be remanded for new hearing.

Respectfully Submitted,



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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Rick R. Lacey,
Defendant-Appellant.

No. 80-2052
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
Unit A
Filed: June 19, 1981

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

The defendant Lacey appeals from revocation of his probation. Because the findings upon which the revocation is based are inadequate to review Lacey's contentions, we remand for further proceedings.

Context Facts

On August 12, 1977, Lacey was placed

on supervised probation for five years, after pleading guilty to an offense involving possession of marijuana with intent to distribute it. In 1980, primarily arising from an arrest on a drug offense in September, 1979, revocation proceedings were instituted against Lacey. Revocation was sought on the basis of three specific violations of probation-conditions:

1. That upon his arrest on September 19, 1979 for possession of illegal drugs, Lacey was found to be in possession of 48.82 grams of methamphetamine and 0.73 grams of marijuana. (It was noted that the state criminal charges for this violation had been dismissed on June 5, 1980.)

2. That upon his arrest, Lacey had in possession and displayed a ficitious and fraud-altered driver's license, which conduct constituted a state misdemeanor.

3. That, according to investigative reports surrounding the September 1979 arrest, Lacey had travelled outside the district of his probation without proper authorization, in that he travelled to North Carolina where he transacted business under an assumed name.

Lacey denied the truth of all of these claimed violations. At the revocation hearing, in which Lacey was represented by counsel, two police officers and a state chemist

testified.[1] Their testimony, which was not contradicted, was a follows:

(a) The first police officer testified that he had observed the defendant Lacey leaning over the front seat of a Volvo automobile and passing something to another man on the right side of the vehicle, who then walked to a Corvette parked six feet away and placed a red-covered object in the right side of the Corvette. Within five minutes, the officer walked over to the Corvette and saw a red baseball cap within the vehicle, within which was a plastic bag with a white substance. He was present when the second testifying officer (see below) made pictures of the cap and took it into his possession. When Lacey was asked for identification after his arrest, he referred the police officers to his identification papers in his pocket; when the officer retrieved the license there found, it was in the name of a Victor M. Wohrley. The driver's license so taken was introduced into evidence at the revocation hearing with photocopy substituted for the original.[2]

---

[1] The probation officer also testified by way of general summary, over objections that his testimony was hearsay. The officer's testimony was solely by way of reporting the information (unattributed to source or by date) upon the basis of which the revocation was instituted. We do not understand the government to rely upon this testimony as evidence of the violations.

(b) The second police officer was detective from the county sheriff's forensic unit. He was called out to the Volvo dealership, where he was shown the Corvette. He photographed the car and the open red baseball cap on its front seat, in which there was a clear plastic bag containing a white substance. (The latter photograph was introduced in evidence at the revocation hearing.) He placed the bag in a sheriff's evidence container, sealed under his name, and he identified its subsequent chain of custody. He also identified the evidence container and the clear plastic bag and contents at the revocation hearing.

(c) The state forensic chemist identified the evidence container and the plastic bag, obtained by her from the second testifying police officer, as containing the substance she tested. The substance was methamphetamine, an illegal drug.

None of the above evidence was contradicted.

---

[2]The defendant's counsel objected to the admission of the license as based on hearsay. The objection was apparently based upon the officer's testimony that a radio check was made on whether "Wohrley" was wanted by the police for any charge. (The report was negative.) The objection is without merit.

In summary: As to Charge 1, from first-hand eyewitness testimony, the district court could reasonably find that the defendant Lacey was in possession of and handed over to another person a package containing (as properly connective subsequent testimony showed) methamphetamine, as charged. As to the remainder of Charge 1, there was no evidence introduced that Lacey also possessed marijuana (although from explanatory comment apparently some had been found in the ashtray of the Volvo).

As to Charge 2, from first-hand testimony the district court could properly find that, at the time of his arrest, Lacey had in his possession and displayed as his own identification a driver's license in the name of another. Although there was no evidence that the license was fictitious or fraudulently altered as alleged, this conduct constituted a violation of an applicable state misdemeanor statute that it was unlawful for any person "[t]o display or to report as one's own any driver's license not issued to such person." Kansas State Acts, Title 8-260(3) (1975).

As to Charge 3, the government introduced no evidence whatsoever that Lacey had left the district of his probation with-

out authorization, as charged.[3]

The Defendant's Contentions on Appeal

The defendant Lacey raises three contentions on appeal. Our difficulty in reviewing the first two contentions (1. alleged insufficiency of the evidence to support probation revocation; 2. improper admission and reliance upon hearsay and in denying confrontation) stems directly from the third contention: "The district court erred in not making findings as to the evidence relied upon and reasons for revoking probation."

---

[3] We should finally note that, at the outset of the hearing, Lacey's counsel expressly stated that his primary defense was that the seizure of the drug and of the driver's license was the product of an illegal search, as had been held in the state court proceedings, resulting in the dismissal of the state charges. The district court made no express finding as to this contention, although its attitude to it was expressed at the time counsel noted the argument: The judge stated that he was not bound by the state court ruling- "I am still concerned about probation. They can't go running around, even if they don't commit a serious crime, they still have to comply with the regulations the probation department set for them." At the close of the hearing, the district court overruled the defendant's formal objection to the admission of the exhibits as illegally seized. The ruling was apparently correctly based upon the decisions of this circuit that (at least in the absence of police harassment, and none is shown here), the exclusionary rule does not apply in revocation proceedings. United States v. Wiygul, 578 F.2d 577 (6th Cir. 1978); United States v. Brown, 488 F.2d 94 (5th Cir. 1973).

As our summary of the evidence indicates, the district court could properly have found the first charge proved-unlawful conduct, i. e., the possession of illegal drugs-and could, in our opinion, within its discretion have revoked probation on that ground alone. Although the second charge is proved as consisting of less culpable conduct than charged, and the third charge is not proven and is at most hinted at in the hearsay summary of the probation officer (see note 1), the district judge would not abuse his discretion if, on the first ground along, he had revoked probation and also (despite otherwise exemplary conduct for three years of probation) denied a reduction of imprisonment for the five-year sentence originally imposed.

Our difficulty here is that, without the district court's findings as to the reason for revocation of probation, we would ordinarily be uncertain as to whether, for instance, the district court additionally based its actions upon a hearsay report of other illegal conduct denied and not proved by the evidence to have occurred.[4]

---

[4] In overruling a hearsay objection to the probation officer's testimony (see note 1), the district court stated: "I am going to let him testify to hearsay. I don't think that a matter of this nature requires strict attention to [hearsay objection]."

The District Court's Reasons

The reasons given for the revocation of probation state general principles and do not contain findings of what conduct charged was proven. At the conclusion of the hearing, after argument by counsel, the court announced as sole explanation for its revocation:

When the Court grants probation to a felon that has been convicted of an offense against the United States, he is assuming that there is a justifiable reason and that the defendant who is placed on probation-and that's assuming-hopefully will lead a life while on probation that is the nature of being exemplary. Doesn't have to be necessarily an out and out criminal violation to be in violation of the order of the Court as far as probation is concerned.

The Court is going to revoke the probation of this defendant, Rick R. Lacey.

In the light of argument by counsel immediately preceding this ruling, an argument could be made that the findings are implicit. The government argued only that it had proved the drug-possession offense of September, 1979, and that the defendant Lacey had used another's license for identification in violation of state misdemeanor law. The government implicitly abandoned any effort to prove the more extended criminal conduct implied by Charge 3,

or the fraudulent alteration of a license alleged by Charge 2. (The defense counsel's argument questioned only the sufficiency of the evidence and the inadmissibility of the illegally seized evidence; neither of which argument is meritorious for present purposes, for the reasons previously indicated.)

In the light of the argument potentially restricting the contentions to the issues argued, we could construe the district court's reasons for revocation to the following effect: (1) the drug possession offense was definitely proved; and (2) this by itself justified the district court's exercise of its discretion to revoke the probation, even though so far as the record shows the transfer of drugs was between acquaintances on a non-commercial basis and was the only incident of probation violation during an otherwise exemplary three years prior to the hearing. On the other hand, without express findings to this effect, the defendant's argument is not totally insubstantial that the district court, in accord with its ruling rejecting hearsay objections in a revocation hearing (see note 4), improperly considered-as reasons not only for revoking probation but also for refusing to reduce the sentence (although three years under supervised probation had passed since imposition of the original five-

year sentence)- a general hearsay summary of why revocation proceedings were instituted (see note 1), even though in fact no evidence was presented that the defendant had without authorization left the district and conducted business in another state under an assumed name.

Under the minimum due process rights afforded a defendant in a parole or revocation proceeding, he is entitled to"a written statement by the factfinders as to the evidence relied on and reasons for revoking . ." Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 1759-60, 1761, 36 L.Ed2d 656 (1973). See also: U.S. v. Tyler, 605 F.2d 851, 852-53 (5th Cir. 1979). For the reasons stated, the general conclusory reasons by the district court for revoking probation do not meet this due process requirement that the revoking judge state the factual findings and the reasons relied upon for revocation.

Conslusion:

Accordingly, we remand this case for further proceedings not inconsistent with the views expressed. We do not intimate that, on the remand, the district court must reopen the proceedings to take further evidence rather than instead to formulate its findings and

reasons on the basis of the evidence previously heard; nor, on the other hand, do we intimate that the district court is foreclosed from reopening the proceedings or from reconsidering, in the light of its findings, its previous rulings on the revocation and on the denial of a reduction of sentence. The defendant's right to further appeal from the ultimate action of the district court is reserved.

CASE REMANDED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOURTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	)	
	)	CR. No. C-77-163
V.	)	
	)	
RICK R. LACEY	)	

MEMORANDUM AND ORDER

The Defendant, Rick R. Lacey, was placed on supervised probation on August 12, 1977, after pleading guilty to a violation of 21 U.S.C. 841. A hearing on the petition for revocation of probation was held on September 24, 1981, and at the conclusion of said hearing the Court announced its decision to revoke the Defendant's probation and to reinstate the sentence of five years' imprisonment originally assessed.

On June 19, 1981, the Court of Appeals for the Fifth Circuit remanded this case for further proceedings. In particular, the Court of Appeals directed this Court to either formulate its findings and reasons on the basis of the evidence previously heard or to reopen the proceedings. After considering the opinion of the Court of Appeals and the previous revocation proceeding in this cause, the Court hereby files the following findings and conclusions based upon evidence submitted at the September 24, 1981, hearing.

Findings

1. The following alleged violations of conditions of probation were reported to the Court:

(1) The Defendant was arrested in Sedgwick County, Kansas, on September 19, 1979, and a complaint was lodged charging him with possession of methaphetamine and marihuana.

(2) The Defendant left the District of Kansas and traveled to the Northern District of North Carolina.

(3) The Defendant had on his person, at the time of his arrest, a fraudulent driver's license.

2. In regard to the first alleged violation, Mr. Bob Downs, Detective with the Sedgwick County Sheriff's office, Wichita, Kansas, testified that on September 19, 1979, he observed the Defendant, who was leaning over the left seat of a Volvo automobile, pass something across to another man who was on the right side of that automobile. The other individual then returned to a white Corvette automobile which was parked approximately six feet away from the Volvo. He was carrying a hat which he placed in the right-hand side of

the Corvette. About five minutes later the Detective walked over to the Corvette and observed inside the vehicle a red baseball cap containing a plastic bag with a white substance in it. Officer Letourneau from the lab was then dispatched to the scene.

3. Officer Letourneau testified that on September 19, 1979, he had occasion to go to the Volvo dealership to photograph the above-mentioned Corvette and dust it for latent fingerprints. He also photographed and took possession of a black-and-red nylon mesh baseball cap which was lying on the seat of the Corvette. Inside the hat was a pack of Camel, nonfilter cigarettes and a clear plastic bab containing a white powder. The hat and its contents were then sealed in a Sheriff's Department evidence container and were ultimately sent to the chemist so that the contents of the bag could be identified.

4. A forensic chemist for the Wichita Police Department, Melinda Doubett, testified that she had run tests on the contents of the plastic bag and had formed the opinion that the substance in the bag was methamphetamine.

5. Detective Downs also testified that a quantity of marihuana was discovered in the ashtray of the Volvo.

6. No evidence was presented to the Court concerning the second alleged violation, that the Defendant traveled outside the District of Kansas at Wichita without proper authorization.

7. As to the third alleged violation, that the Defendant had on his person and displayed a fictitious and fraudulently altered driver's license, Detective Downs' testimony indicated that after being arrested the Defendant was asked for his identification and he responded that it was in his pocket. An officer reached in the Defendant's pants' pocket and produced a Kansas driver's license in the name of Victor W. Wohrley. The record was then checked to see whether or not the Defendant was wanted and if he was in fact that person.

Conclusions

1. From the testimony of Detectives Downs and Letourneau and the forensic chemist, Ms. doubette, the Court concludes that the Defendant violated the first alleged condition in that he was in possession of a quantity of methamphetamine and passed the substance to another. Evidence that would establish guilt beyond a reasonable doubt is not required to support the Court's decision to revoke probation. The evidence must merely be sufficient

to satisfy the Court that "the conduct of the probationer did not comport with conditions of probation." United States v. Rivera, 614 F.2d 1049, 1050 (5th Cir. 1980). When the Court grants probation to a felon that has been convicted of an offense against the United States, he is assuming there there is a justifiable reason and that the Defendant who is placed on probation--and that's assuming--hopefully will lead a life while on probation that is the nature of being exemplary. It doesn't have to be necessarily an out-and-out criminal violation to be in violation of the order of the Court as far as probation is concerned.

2. The evidence presented to the Court indicating that the Defendant was in possession of a quantity of marijuana was clearly insufficient to hold the Defendant in violation of the second part of alleged violation number one.

3. The Court further finds that the Defendant did not violate the condition of probation which prohibited him from leaving the district of his probation without authorization.

4. From testimony of Detective Downs, the Court concludes that the Defendant had on his person at the time of his arrest, and was using as if it were in fact his, a

driver's license in the name of Victor W. Wohrley. This action by the Defendant was in violation of a Kansas misdemeanor statute. To this extent the Court finds that the Defendant violated the charge in number three.

For the above-mentioned reasons and with emphasis on Finding Number One, the Court hereby revokes the probation of the Defendant Rick R. Lacey. The sentence of five years' imprisonment originally assessed in this matter will be enforced.

IT IS SO ORDERED.

SIGNED this 7th day of October, 1981.

/s/ Owen D. Cox

UNITED STATES DISTRICT JUDGE

Filed by the Clerk: October 7, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF America,

Plaintiff-Appellee,

v.

Rick R. Lacey,

Defendant-Appellant.

No. 80-2052

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.*

Unit A

Filed: November 9, 1981

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ, and TATE, Circuit Judges.

TATE, Circuit Judge:

The defendant Lacey appeals from the revocation of his probation. Earlier, we remanded these proceedings because we found the findings upon which the revocation was based were inadequate to review Lacey's contentions.

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

648 F.2d 441 (5th Cir. 1981). Although our decree was somewhat ambiguous, we intended that, upon the district court's entering findings, the appellant could seek further review by filing a certified copy of the district court's findings plus any supplementary briefs and materials, without the necessity of filing a new notice of appeal. See Chaney v. Schweiker, 659 F.2d 676, 679 at n.5 (5th Cir. 1981); United States v. Gaston, 608 F.2d 607, 614 at n.3 (5th Cir. 1979). This, in fact, was the procedure followed. After reviewing the district court's findings of fact and conclusions of law on remand set forth by its memorandum order filed October 7, 1981, we affirm the revocation of probation.

Our remand was occasioned by our concern, in the absence of a specific finding, that the district court in revoking probation and denying a reduction of the five-year sentence of imprisonment originally imposed may have given credence to hearsay summary testimony indicating more extended criminal conduct than that proved at the revocation hearing. No evidence, other than the hearsay summary, was presented as to the charge that Lacey had traveled outside the district of his probation to North Carolina, where he

transacted business under an assumed name. On the remand, the district court found that there was no evidence to support this charge, but stated that it had not based its revocation upon it. (The district court also found that the evidence was insufficient to show that the defendant was in possession of a small quantity of marijuana found in a nearby automobile at the time that Lacey was arrested for possession of 48.82 grams of methamphetamine.)

However, the district court found that the evidence clearly proved that the defendant was in possession of the 48.82 grams of methamphetamine and had passed the substance to another on September 19, 1978, when he was then arrested. The court also noted that, with primary emphasis on this offense alone, it revoked Lacey's probation and re-imposed the original sentence of five years imprisonment. (The court further found that the evidence showed that at the time of the arrest Lacey was using a driver's license in the name of another in violation of a Kansas misdemeanor statute, also a violation of the condition of probation.)

On this further appeal, the defendant Lacey argues that the evidence was insufficient to support these findings, and

that, at any rate the court abused its discretion in revoking the probation and in denying a reduction of sentence. These contentions are without reversible merit.

As recently summarized by us in United States v. Feinberg, 631 F.2d 388, 391 (5th Cir. 1980):

> The evidence to support a revocation need not establish guilt beyond a reasonable doubt; all that is required is that the evidence of the facts reasonably satisfy the judge that the conduct of the probationer violates the conditions of probation. The district court has broad discretion with regard to the revocation of probation, and its actions will not be disturbed in the absence of a clear showing of an abuse of that discretion. Burns v. United States, 287 U.S. 216, 221, 53 S.Ct 154, 156, 77 L.Ed. 266; United States v. McLoed, 608 F.2d 1076, 1078 (5th Cir. 1979).

Further, insofar as the defendant complains of the trial court's denial of a reduction of sentence, under Fed. R. Crim. P. 35 such a motion is addressed to the discretion of the trial judge, and it will be reversed on review only for illegality or a gross abuse of discretion. United States v. Nerren, 613 F.2d 572, 573 (5th Cir. 1980).

We find no such abuse of discretion here. Nor do we find, as contended, that the revocation of probation violated the principles approved by United States v. Reed, 573 F.2d 1020 (8th Cir. 1978). Here (unlike in Reed), the decision to revoke probation was not a reflexive reaction to some technical violations of the probation conditions; it was, rather, properly based upon behavior that the district court reasonably found indicated that the offender "cannot be counted on to avoid antisocial activity." 573 F.2d at 1024.

Accordingly, we AFFIRM the revocation of probation.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-2052

D. C. Docket No. C-77-163

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICK R. LACEY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before BROWN, POLITZ and Tate, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby affirmed.

NOVEMBER 9, 1981

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-2052

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICK R. LACEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(January 4, 1982)

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/s/ Albert Tate, Jr.

United States Circuit Judge

Opposition

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1501

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICK R. LACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the revocation of petitioner's probation.

2. Whether evidence that was properly discovered by police officers independently supported revocation of petitioner's probation, thus rendering harmless any purported illegal seizure of additional evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1501

RICK R. LACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C(1)-C(5)) is reported at 661 F. 2d 1021. A prior opinion of the court of appeals remanding the case to the district court (Pet. App. A(1)-A(10)) is reported at 648 F. 2d 441. The memorandum opinion of the district court (Pet. App. B(1)-B(6)) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C(6)) was entered on November 9, 1981. A petition for rehearing was denied on January 4, 1982 (Pet. App. D(1)), and the petition for a writ of certiorari was filed on January 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 12, 1977, petitioner pleaded guilty in the United States District Court for the Southern District of

Texas to possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court suspended execution of a five-year sentence and placed petitioner on supervisory probation for five years (Pet. 3).

In April 1980, a petition for revocation of probation was filed, alleging that petitioner had violated the conditions of his probation on September 19, 1979, in Sedgwick County, Kansas. The petition for revocation alleged three specific violations (Pet. App. A(2)): (1) that upon his arrest on September 19, 1979, for possession of illegal drugs, petitioner had in his possession 48.82 grams of methamphetamine and .73 grams of marijuana; (2) that upon his arrest, petitioner had in his possession and displayed a fictitious and fraudulently altered driver's license, which conduct constitutes a misdemeanor in Kansas; and (3) that petitioner had traveled outside the district of his probation without authorization. It was noted that the state criminal charges against petitioner for possession of illegal drugs had been dismissed (*ibid.*).

Following a hearing on the revocation petition, the district court revoked petitioner's probation and sentenced him to the original five years' imprisonment, to be followed by a special parole term of three years. After remanding the case to the district court for the entry of findings as to the evidence relied on and the reasons for revoking petitioner's probation (Pet. App. A(1)-A(11)), the court of appeals affirmed (Pet. App. C(1)-C(5)).

2. Sedgwick County Police Detective Bob Downs testified at the revocation hearing that on September 19, 1979, he observed petitioner lean over the front, left seat of a Volvo automobile parked in a parking lot in Wichita, Kansas, and pass something to another man who was on the right side of the car. The other man then walked to a Corvette parked six feet away and placed a red-covered object in the right side of the Corvette. About five minutes

later, Detective Downs walked over to the Corvette and saw inside it a red baseball cap containing white powder in a plastic bag (Pet. 5, 11-12; Pet. App. A(3), B(2)-B(3)). Petitioner was then arrested, handcuffed, and asked for his identification. After petitioner indicated that his identification was in his pocket, a police officer removed a driver's license in the name of Victor Whorley from petitioner's pants pocket (Pet. 6; Pet. App. A(3), B(4)). A state forensic chemist later analyzed the contents of the plastic bag and determined that the substance was methamphetamine (Pet. 7; Pet. App. A(4), B(3)).

In addition, a probation officer testified from hearsay evidence that petitioner had been arrested in Sedgwick County, Kansas, on September 19, 1979, that he was charged with possession of methamphetamine and marijuana, that he had left Kansas and traveled to North Carolina, and that he had had a fraudulent driver's license in his possession at the time of his arrest (see Pet. App. A(3) n.1).

At the conclusion of the hearing, the district court revoked petitioner's probation, without making any express findings of fact.

3. On petitioner's initial appeal, the court of appeals remanded the case to the district court for a statement of the evidence and reasons on which it had relied to revoke petitioner's probation. Although the court of appeals held that the district court reasonably could have found from the evidence presented at the revocation hearing that petitioner had been in possession of methamphetamine at the time of his arrest and could properly have revoked petitioner's probation on that ground alone (Pet. App. A(5), A(7)), it further held that the third charge—that petitioner had left the district of his probation without authorization—was supported by nothing more than "the hearsay summary of the probation officer" (Pet. App. A(7)). Accordingly, in the absence of findings of fact, the court of appeals could not

determine whether the district court had properly revoked petitioner's probation on the basis of the drug charge alone or whether the order of revocation was improperly based on the hearsay testimony of the probation officer concerning the charge of leaving the jurisdiction without authorization.[1]

4. On remand, the district court found that there was no evidence to support either the charge that petitioner had traveled outside the district of his probation or the charge that he had possessed a small quantity of marijuana at the time of his arrest (Pet. App. B(4)-B(5)). The court found, however, that the evidence clearly proved that petitioner was in possession of 48.82 grams of methamphetamine and had passed the substance to another on the date he was arrested (*ibid.*). The court specified that it was revoking petitioner's probation primarily on that ground (Pet. App. B(6)), although it further found that at the time of his arrest petitioner was using a driver's license in the name of another, in violation of a Kansas misdemeanor statute (Pet. App. B(4)-B(6)). The court of appeals affirmed (Pet. App. C(1)-C(5)), also noting that the primary basis for the district court's revocation of petitioner's probation was the methamphetamine charge (Pet. App. C(3)).

ARGUMENT

1. Petitioner contends (Pet. 9-16) that he was deprived of due process because there was insufficient evidence that he possessed and distributed a quantity of methamphetamine on the day of his arrest. Petitioner suggests (Pet. 14-16) that this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), mandate a stricter standard of proof than that established in

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[1]The court of appeals also held that the district court had correctly overruled petitioner's objection that the evidence introduced against him had been illegally seized, because "the exclusionary rule does not apply to revocation proceedings" (Pet. App. A(6) n.3).

Burns v. *United States*, 287 U.S. 216, 221 (1932). Petitioner's argument must fail, however, for the standard of proof urged by petitioner[2] is not one of the procedural elements that either *Morrissey* v. *Brewer* or *Gagnon* v. *Scarpelli* found to be due the subject of a probation or parole revocation hearing.

It is well settled that the revocation of probation or parole "is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole [or probation] revocation." *Morrissey* v. *Brewer, supra*, 408 U.S. at 480. For example, depositions, affidavits and other documentary evidence not admissible in a criminal prosecution are nonetheless admissible at a probation revocation hearing. *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 783 n.5, 789; *Morrissey* v. *Brewer, supra*, 408 U.S. at 489. See also Fed. R. Evid. 1101(d)(3) (Federal Rules of Evidence do not apply to probation revocation hearings). The key factor at such a hearing is "fundamental fairness." *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 790.

In keeping with this requirement of fundamental fairness, this Court has held that a probationer or parolee who is threatened with revocation of that status is entitled to advance written notice of the violations he is alleged to have committed, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good reason for not permitting confrontation), a

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[2]Petitioner appears (Pet. 13-14) to be arguing for the "beyond a reasonable doubt" standard of proof that is applicable to criminal prosecutions. More generally (Pet. 14), he contends that "evidence of * * * facts [that] reasonably satisfy the judge that the conduct of the probationer violates the conditions of probation" is insufficient.

neutral and detached hearing body, and, in the event probation or parole is revoked, a written statement by the fact finders concerning the evidence relied on and the reasons for revocation. *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 786; *Morrissey* v. *Brewer, supra*, 408 U.S. at 489.[3]

As the Court itself noted in *Morrissey, supra*, 408 U.S. at 489, the procedural safeguards it required in that case do not transform a revocation hearing into a criminal trial with its full panoply of due process rights.[4] Accordingly, the standard of proof at a revocation hearing is far less stringent than the "beyond a reasonable doubt" standard applicable in a criminal trial. Rather, it is sufficient if the evidence satisfies the revoking court that the probationer violated the conditions of his probation, and the revoking court is subject to reversal only where it can be shown to have abused its discretion in ordering revocation. See *United States* v. *Feinberg*, 631 F. 2d 388, 391 (5th Cir. 1980); *United States* v. *Torrez-Flores*, 624 F. 2d 776, 782 (7th Cir. 1980); *United States* v. *Rivera*, 614 F. 2d 1049, 1050 (5th Cir. 1980); *United States* v. *Burkhalter*, 588 F. 2d 604, 606 (8th Cir. 1978); *United States* v. *Manuszak*, 532 F. 2d 311, 317 (3d Cir. 1976); *Roberson* v. *State of Connecticut*, 501 F. 2d 305, 308 (2d Cir. 1974); *United States* v. *Williams*, 378 F. 2d 665, 666 (4th Cir. 1967).

In view of this standard of proof, the court of appeals was clearly justified in concluding that the district court did not abuse its discretion in revoking petitioner's probation. The

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[3]In addition, in some circumstances due process may require the appointment of counsel for indigent probationers. *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 790-791. A federal probationer has a statutory right to appointed counsel at federal revocation proceedings. 18 U.S.C. 3006A(b); Fed. R. Crim. P. 32.1(a)(2)(E).

[4]"We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." 408 U.S. 489.

evidence at the revocation hearing showed that a police detective had observed petitioner lean over the front seat of a car and pass an object to a man on the other side of the vehicle, who then placed a red object in a Corvette parked nearby. Five minutes later, the detective observed in the Corvette a red baseball cap containing what later was determined to be methamphetamine. This was sufficient evidence from which the court could reasonably conclude that petitioner had possessed and transferred methamphetamine, in violation of the conditions of his probation.

2. Petitioner next argues (Pet. 17-20) that his wallet was seized in violation of his Fourth Amendment rights and that its introduction as evidence at his revocation hearing was therefore improper. Even assuming that petitioner's claim that his wallet was unlawfully seized had merit,[5] however, this case would not present the question whether the exclusionary rule should apply to probation revocation proceedings in an appropriate posture for this Court's consideration.

As the court of appeals noted on its first review of this case (Pet. App. A(7)), the evidence of petitioner's possession and transfer of methamphetamine alone provided sufficient reason for revocation of his probation. Indeed, on remand the district court clearly pointed out (Pet. App. B(6)) that it based its revocation of petitioner's probation chiefly on this charge rather than on petitioner's possession of another's driver's license, and the court of appeals affirmed on the same basis (Pet. App. C(3)). Because petitioner is not challenging the legality of the seizure of the

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[5]In view of Officer Downs' observations (see pages 2-3, *supra*), however, it is difficult to see how the seizure of petitioner's wallet was not lawful as incident to a valid arrest. See *Chimel* v. *California*, 395 U.S. 752 (1969).

evidence introduced against him on the drug charge,[6] and because that charge is a sufficient, and indeed was the principal, basis for revocation of petitioner's probation, the Court need not consider whether additional evidence offered in support of revocation was properly admitted at the probation revocation hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

APRIL 1982

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[6]Although, in its first opinion in this case, the court of appeals noted (Pet. App. A(6) n.3; emphasis added) that at the revocation hearing petitioner's counsel had stated that "his primary defense was that the seizure *of the drug* and of the driver's license was the product of an illegal search," petitioner has claimed neither in the court of appeals nor before this Court that the seizure of the methamphetamine was unlawful. Indeed, it is difficult to conceive of such an argument, since the drug had been in Officer Down's plain view in an unoccupied Corvette, which was suspected to have been stolen (Pet. 6), when he seized it.

DOJ-1983-04